

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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DEPUTY

THOMAS A. DILLON, Independent
Fiduciary of Employers Mutual Plans

PLAINTIFF

v.

JAMES GRAF, et al.

DEFENDANT

CIVIL ACTION NO.
CV-N-03-0119-HDM(VPC)

MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

Defendants, Dennis Schrecker ("Schrecker") and Thompson Associates, Inc. ("Thompson"), enter their Special Appearance for the sole purpose of objecting to this Court's exercise of personal jurisdiction. Schrecker and Thompson hereby respectfully request that this Court dismiss the Plaintiff's Complaint pursuant to Fed.R.Civ.P. 12(b)(2) on the grounds that they have no contacts with the State of Nevada.

Schrecker and Thompson do not maintain an office, own property, or have a post office box or other address in Nevada. They have no employees, do not maintain a telephone, and conduct no regular or ongoing business in Nevada. For this Court to exercise personal jurisdiction over Schrecker and Thompson would offend traditional notions of fairness and substantial justice in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. A Memorandum in Support of this Motion and proposed Order are attached.

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Respectfully submitted,



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C. Tyson Gorman
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***Counsel for Defendants Dennis Schrecker
and Thompson Associates, Inc.***

CERTIFICATE OF SERVICE

This is to certify that true and correct copies of the foregoing Motion, proposed Order, and supporting Memorandum have been served upon the following, by first-class mail, postage prepaid, on this 2nd day of January, 2004:

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Lead Defense Counsel

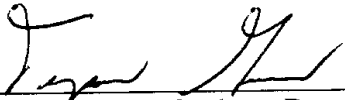
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This will also certify that, pursuant to the Court's Case Management Order of October 22, 2003, true and correct copies of the foregoing Motion, proposed Order, and supporting Memorandum have been deposited with Evan Firstman, Sierra Legal Duplicating, 124 W. Taylor, Reno, NV 89505 and all counsel and pro se litigants, other than those noted above, have been given notice of such deposit.



One of Counsel for Defendants Dennis Schrecker
and Thompson Associates, Inc.

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**THOMAS A. DILLON, Independent
Fiduciary of Employers Mutual Plans**

CIVIL ACTION NO.
CV-N-03-0119-HDM(VPC)

JAMES GRAF, et al.

20213886.1

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

THOMAS A. DILLON, Independent
Fiduciary of Employers Mutual Plans

PLAINTIFF

v.

JAMES GRAF, et al.

DEFENDANT

CIVIL ACTION NO.
CV-N-03-0119-HDM(VPC)

**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR
LACK OF PERSONAL JURISDICTION**

Defendants, Dennis Schrecker ("Schrecker") and Thompson Associates, Inc. ("Thompson"), by counsel, in support of their Motion to Dismiss for Lack of Personal Jurisdiction, state as follows:

INTRODUCTION

Thompson and Schrecker are Insurance Producer (i.e. non-RICO) Defendants in the current action. Thompson is a small, Kentucky-based insurance agency which employs Schrecker as an agent. According to the Complaint, Thompson and Schrecker should be held liable for negligence of duty, breach of contract, professional malpractice and breach of warranty. In filing this action, Plaintiff unfairly seeks to force Thompson and Schrecker to litigate in this Court, even though neither Thompson nor Schrecker have transacted any business in Nevada and all significant events giving rise to their involvement in this litigation occurred in Kentucky and New Jersey.

It is clear that Thompson and Schrecker do not have sufficient contacts with Nevada for this Court to exercise personal jurisdiction over them. Neither Thompson nor Schrecker maintain an office, own property, or have a post office box or other address in

Nevada. Thompson and Schrecker have no employees, do not maintain a telephone, and conduct no regular or ongoing business in Nevada. Moreover, none of the significant events which led to their involvement in this litigation took place within Nevada. This Court should consequently dismiss this action.

FACTS

Thompson's and Schrecker's connection with this controversy is extremely limited, consisting solely of signing-up less than fifty independent truckers, all associated with a single Kentucky-based transportation company, for the subject insurance program. None of the fewer than fifty clients resided in Nevada, and no policies were sold there by either Thompson or Schrecker. In completing applications for insurance policies, Thompson dealt exclusively with a New Jersey-based entity known as American Benefits Society.

Neither Thompson nor Schrecker have any connection to Nevada. Further, none of the significant events which led to their involvement in this matter took place in Nevada. Thompson is a Kentucky corporation doing business primarily in Kentucky. Schrecker is an agent of Thompson located in Kentucky doing business primarily in Kentucky. Neither has employees in Nevada nor maintains an address, post office box or telephone number there.¹ This Court lacks personal jurisdiction over Thompson and Schrecker and this Court should therefore dismiss this action as it pertains to them.

¹ See Affidavits of Dennis Schrecker and Don Thompson, attached hereto as Exhibits A and B respectively.

ARGUMENT

DEFENDANTS THOMPSON AND SCHRECKER ARE NOT SUBJECT TO PERSONAL JURISDICTION IN NEVADA AND PLAINTIFF'S CLAIM AGAINST THEM SHOULD BE DISMISSED

A federal court analyzing whether personal jurisdiction exists must look to the forum state's long-arm statute and must construe that statute within the bounds of the Due Process Clause of the Fourteenth Amendment. This typically results in a two part inquiry into (1) whether the forum's long-arm statute grants personal jurisdiction and (2) whether such jurisdiction meets the requirements of due process. *Rio Properties, Inc., v. Rio International Interlink*, 284 F.3d 1007, 1019 (9th Cir. 2002). Nevada's long-arm statute permits the exercise of jurisdiction to the same extent as the Constitution. Nev. Rev. Stat. § 14.065 (2001). "Hence, we consider only the constitutional principles of due process which require RII have minimum contacts with Nevada 'such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *Rio Properties, Inc., v. Rio International Interlink*, 284 F.3d 1007, 1019 (9th Cir. 2002) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

A. PLAINTIFF CANNOT MEET ITS BURDEN OF ESTABLISHING THE REQUISITE MINIMUM CONTACTS FOR PERSONAL JURISDICTION

"Although the defendant is the moving party on a motion to dismiss, the plaintiff bears the burden of establishing that jurisdiction exists." *Rio Properties, Inc., v. Rio International Interlink*, 284 F.3d 1007, 1009 (9th Cir. 2002) (citing *KVOS v. Associated Press*, 299 U.S. 269, 278 (1946)). To defeat such a motion, "The plaintiff must produce some evidence in support of all facts necessary for a finding of personal jurisdiction, and the burden of proof never shifts to the party challenging jurisdiction." *Trump v. District Court*, 857 P.2d 740, 744

(Nev. 1993). Because Plaintiff cannot meet this substantial burden, this action should be dismissed for lack of personal jurisdiction.

Under the Due Process Clause, a defendant may be subject to the personal jurisdiction of a foreign court to the extent that the exercise of such jurisdiction "does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Company v. State of Washington*, 326 U.S. 310, 316 (1945) (citation omitted). Traditional notions of "fair play and substantial justice" are properly served with regard to the exercise of personal jurisdiction when the defendant has certain "minimum contacts" with the forum state,² of a "systematic and continuous" nature,³ rather than contacts which are "irregular," "casual," "random," "fortuitous," or "attenuated,"⁴ such that the defendant "purposefully avails itself of the privilege of conducting activities in the forum State,"⁵ or "purposefully direct[s]' activities at forum residents."⁶ "The relationship between the defendant and the forum must be such that it is 'reasonable . . . to require the corporation to defend the particular suit which is brought there,'" *World-Wide Volkswagen Corp.*, 444 U.S. at 292, and that defendants have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign." *Burger King Corp.*, 471 U.S. at 472, (quoting *Shaffer v. Heitner*, 433 U.S. 186, 218, (1977) (Stevens, J., concurring)).

² *International Shoe Co.*, 326 U.S. at 316.

³ *Id.*, 326 U.S. at 320; See also *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415-16, (1984).

⁴ *International Shoe Co.*, 326 U.S. at 320; 90 L.Ed. at 104; *Burger King Corporation v. Rudzewicz*, 471 U.S. 462, 475 (1985).

⁵ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)(quoting *Hanson v. Denckla*, 357 U.S. 235, 253, (1958)).

⁶ *Burger King Corp.*, 471 U.S. at 477, (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)).

Applying this standard, Thompson's and Schrecker's lack of sufficient minimum contacts with Nevada is fatal to Plaintiff's cause of action.

In construing and applying the doctrine of "fair play and substantial justice," the Supreme Court has expressly "reject[ed] any talismanic jurisdictional formulas." *Burger King Corp.*, 471 U.S. at 485. *See also International Shoe Co.*, 326 U.S. at 319 ("the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative."). "[T]he facts of each case must be weighed' in determining whether personal jurisdiction would comport with 'fair play and substantial justice.'" *Burger King Corp.*, 471 U.S. at 485-86, (brackets in original; quoting *Kulko v. California Superior Court*, 436 U.S. 84, 92 (1978)). This fundamental concern of "fairness" is appraised from the standpoint of the defendant. *See Phillips Petroleum Company v. Shutts*, 472 U.S. 797, 807 (1985) ("the purpose of this test, of course, is to protect a defendant from the travail of defending in a distant forum, unless the defendant's contacts with the forum make it just to force him to defend there")(emphasis added). In determining whether the exercise of in personam jurisdiction comports with due process, the burden of out-of-state litigation on the defendant is the "primary concern." *World-Wide Volkswagen Corp.*, 444 U.S. at 292.

B. NEVADA HAS NEITHER GENERAL NOR SPECIFIC PERSONAL JURISDICTION OVER DEFENDANTS

In establishing the minimum contacts doctrine, courts have drawn a distinction between "general" and "specific" personal jurisdiction. *See Burger King Corp.*, 471 U.S. at 473 n.15, *Helicopteros Nacionales de Colombia*, 466 U.S. at 414. In a case of *general* personal jurisdiction, the defendant's contacts with the forum state are of such a "continuous and systematic" nature that the court may exercise jurisdiction over the defendant even if the cause of action is unrelated to those contacts. *Helicopteros Nacionales de Colombia*, 466 U.S. at 414,

416. In contrast, *specific* personal jurisdiction is exercised "[w]hen a controversy is related to or 'arises out of' a defendant's contacts with the forum" *Helicopteros Nacionales de Colombia*, 466 U.S. at 414. In this instance, Nevada has neither *general* nor *specific* jurisdiction over either Thompson or Schrecker.

Neither Thompson or Schrecker has had continuous and systematic contacts with Nevada. Thompson is a Kentucky corporation, and Schrecker is a resident of Kentucky. Neither Thompson nor Schrecker maintains a Nevada address or phone number. They have no offices, property, or employees in Nevada and conduct no ongoing or regular business with persons or entities residing in Nevada. Because Thompson and Schrecker lack the required "continuous and systematic" contacts with Nevada, an exercise of *general* personal jurisdiction in this case is simply impossible.

An exercise of *specific* personal jurisdiction would likewise be improper under the three-part test used by the Ninth Circuit to determine whether an exercise of specific jurisdiction comports with the Due Process Clause. In *Myers v. The Bennett Law Office*, 238 F.3d 1068, 1072 (9th Cir. 2000), the Court wrote "[W]e use a three-part test to evaluate the nature and quality of Bennett's contacts for purposes of specific jurisdiction: First, some action must be taken whereby Bennett purposefully availed itself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of the forum's law. Second, the claim must arise out of Bennett's forum-related activities. Third, the exercise of jurisdiction must be reasonable." (citations omitted).

**(1) THOMPSON AND SCHRECKER DID NOT AVAIL
THEMSELVES OF THE PRIVILEGE OF TRANSACTING
BUSINESS IN NEVADA**

Of the three elements required for specific personal jurisdiction to be exercised, the purposeful availment component is the most vital, and the one which Plaintiff has the most remote possibility of establishing. As the Supreme Court has stated,

[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of [the minimum contacts] rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

Hanson v. Denckla, 357 U.S. 235, 253 (1958) (emphasis added). See also *Burger King Corp.*, 471 U.S. at 474-75, (quoting *Hanson v. Denckla*); *LAK, Inc. v. Deer Creek Enters.*, 885 F.2d 1293, 1301 n.6 (6th Cir. 1989), cert. denied, 494 U.S. 1056 (1990)("[t]he 'substantial connection' between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State"; quoting *Asahi Metal Industry Co., Ltd. v. Superior Court*, 480 U.S. 102, 112, (1987) (emphasis in original)); *Southern Machine Co. v. Mohasco Industries, Inc.*, 401 F.2d 374, 381-82 (6th Cir. 1968) (purposeful availment of the privilege of transacting business in the forum state is "the *sine qua non* for in personam jurisdiction.").

In *Rio Properties, Inc. v. Rio International Interlink*, 284 F.3d 1007, 1019 (9th Cir. 2002), the Court wrote "[T]he purposeful availment requirement ensures that a non-resident will not be haled into court based upon random, fortuitous, or attenuated contacts with the forum state. A non-resident defendant purposefully avails itself of the forum if its contacts with the forum are attributable to (1) intentional acts; (2) expressly aimed at the forum; (3) causing harm,

the brunt of which is suffered -- and which the defendant knows is likely to be suffered -- in the forum.” (citations omitted).

A review of the facts clearly demonstrates that Thompson and Schrecker never purposefully availed themselves of the benefits and protections of Nevada law. Neither Thompson nor Schrecker maintain an office, own property, or have a post office box or other address in Nevada. They have no employees, do not maintain a telephone, and conduct no regular or ongoing business in Nevada.

Neither Thompson nor Schrecker committed an intentional act expressly aimed at Nevada. Rather, they signed up fewer than fifty independent truckers, all associated with a single Kentucky-based transportation company, for the subject insurance program. None of the fewer than fifty clients resided in Nevada, and no policies were sold there. In completing applications, Thompson and Schrecker dealt exclusively with a New Jersey-based entity known as American Benefits Society.

In *Myers v. The Bennett Law Office*, 238 F.3d 1068, 1072 (9th Cir. 2000), the Court wrote “In *Calder*, the Supreme Court held that a foreign act that is both aimed at and has effect in the forum state satisfies the purposeful availment prong of the specific jurisdiction analysis . . . Subsequent cases have struggled somewhat with *Calder*’s import, recognizing that the case cannot stand for the broad proposition that a foreign act with foreseeable effect in the forum state always gives rise to specific jurisdiction. We have said that there must be ‘something more,’ but have not spelled out what the something more must be. We now conclude that ‘something more’ is what the Supreme Court described as ‘express aiming’ at the forum state. Express aiming is a concept that in the jurisdictional context hardly defines itself. From the available cases, we deduce that the requirement is satisfied when the defendant is alleged to

have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state.” (citations omitted).

Thompson and Schrecker did not “expressly aim” their actions at a plaintiff whom they knew to be a resident of Nevada. Instead, Thompson and Schrecker signed up fewer than fifty independent truckers, all associated with a single Kentucky-based transportation company, for the subject insurance program.

Thompson and Schrecker did not purposefully avail themselves of the benefits and protections of Nevada law. Plaintiff cannot demonstrate that any of the requirements enumerated in *Myers* or *Rio Properties* have been satisfied. Plaintiff’s Complaint against Thompson and Schrecker should accordingly be dismissed.

**(2) THE ASSERTED CAUSES OF ACTION DO NOT ARISE
FROM NEVADA RELATED ACTIVITIES**

Plaintiff cannot establish that the causes of action asserted in its Complaint arise out of, or relate to, any actions taken by Thompson and Schrecker in Nevada. In fact, neither Schrecker nor Thompson conducted any activities or took any action in Nevada. In *Rio Properties, Inc., v. Rio International Interlink*, 284, F.3d 1007, 1021 (9th Cir. 2002), the Court wrote “[T]he second requirement for specific jurisdiction is that RIO’s claims arise out of RII’s Nevada-related activities. This requirement is satisfied if RIO would not have been injured ‘but for’ RII’s conduct in Nevada.” (citing *Panavision Int’l, L.P. v. Toeppen*, 141 F.3d 1316, 1322 (9th Cir. 1998).

Neither Thompson nor Schrecker had any conduct in Nevada. Their limited connection to the present controversy amounts only to signing up fewer than fifty clients, all associated with a single Kentucky-based transportation company, for the subject insurance program. None of the fewer than fifty clients resided in Nevada, and no policies were sold there.

Because Thompson and Schrecker did not conduct any activities in Nevada, the Plaintiff cannot demonstrate that it would not have been injured "but for" Thompson's and Schrecker's conduct in Nevada. As there was no conduct in Nevada, Plaintiff's Complaint should accordingly be dismissed.

**(3) EXERCISE OF JURISDICTION OVER THESE DEFENDANTS
WOULD BE UNREASONABLE**

Inquiry as to whether traditional notions of fair play and substantial justice are satisfied does not end with the "minimum contacts" analysis. The Court must consider whether the acts of a non-resident defendant or the consequences caused by that defendant have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

Once it has been established that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with "fair play and substantial justice." *Burger King Corp.*, 471 U.S. at 476.

Such factors, dubbed the "gestalt factors" by the Supreme Court, include "the forum State's interest in adjudicating the dispute," "the burden on the defendant," "the plaintiff's interest in obtaining convenient and effective relief," "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and "the shared interest of the several States in furthering fundamental substantive social policies." *Burger King Corp.*, 471 U.S. at 477, *World-Wide Volkswagen Corp.*, 444 U.S. at 292.

Nevada is not a reasonable or convenient forum for either Thompson or Schrecker, or any of the individual claimants that conducted business with Thompson or Schrecker. The Plaintiff in this case was designated to represent thousands of individuals, and

opted to bring the current action in Nevada. However, none of the individual claimants that dealt with Thompson or Schrecker have any contacts in Nevada. None of the claimants live in Nevada, and no policies were sold in Nevada. Neither Thompson nor Schrecker affirmatively acted in Nevada. Any acts taken by Thompson and Schrecker outside Nevada did not cause any consequences within the State sufficient to support the exercise of jurisdiction.

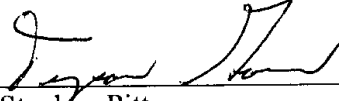
Nevada has no fundamental substantive social policy at issue in this litigation and its interest in adjudicating the matter between Plaintiff and Thompson and Schrecker is minimal at best, because they did not engage in wrongful conduct “expressly aimed” at Nevada. *See Rio Properties, Inc.*, 283 F.3d at 1019. Because Thompson and Schrecker are foreign corporations and residents and because a majority of the relevant witnesses and documents are located in Kentucky, trying this matter in Nevada would impose a significant burden on Thompson and Schrecker, and is wholly contrary to the judicial system’s interest in obtaining the most efficient resolution of controversies.

In short, Plaintiff cannot carry its burden of proving that jurisdiction over Thompson or Schrecker satisfies the Due Process Clause. Accordingly, all claims against them should be dismissed.

CONCLUSION

For the reasons stated above, this Court should grant Thompson’s and Schrecker’s Motion to Dismiss for Lack of Personal Jurisdiction.

Respectfully submitted,



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Louisville, Kentucky 40202-2898
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***Counsel for Defendants Dennis Schrecker
and Thompson Associates, Inc.***

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

THOMAS A. DILLON, Independent
Fiduciary of Employers Mutual Plans

PLAINTIFF

v.

JAMES GRAF, et al.

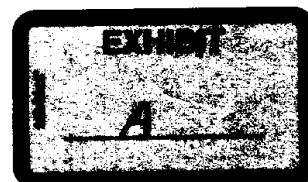
DEFENDANT

CIVIL ACTION NO.
CV-N-03-0119-HDM(VPC)

AFFIDAVIT

The Affiant, DENNIS SCHRECKER, being first duly sworn, deposes and states as follows based on his personal knowledge:

1. I am an insurance agent employed by Thompson Associates, Inc. I have personal knowledge of the matters set out herein.
2. I was involved in the sale of the subject insurance program.
3. The subject insurance program was sold to fewer than fifty independent truckers, who were all associated with a Kentucky-based transportation company.



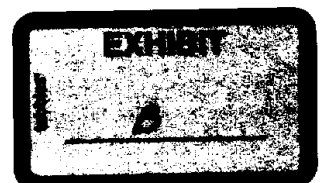
UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

THOMAS A. DILLON, Independent)	
Fiduciary of Employers Mutual Plans)	
)	
PLAINTIFF)	CIVIL ACTION NO.
)	CV-N-03-0119-HDM(VPC)
v.)	
)	
JAMES GRAF, et al.)	
)	
DEFENDANT)	

AFFIDAVIT

The Affiant, DON THOMPSON, being first duly sworn, deposes and states as follows based on his personal knowledge:

1. I am the owner of Thompson Associates, Inc., an insurance agency located in Kentucky. My agency employs Dennis Schrecker as an agent. I have personal knowledge of the matters set out herein.
2. Thompson Associates, Inc. was involved in the sale of the subject insurance program.
3. The subject insurance program was sold to fewer than fifty independent truckers, who were all associated with a Kentucky-based transportation company.



4. None of the independent truckers who purchased the subject insurance program resided in Nevada. Thompson Associates, Inc. did not sell any policies of the subject insurance program in Nevada.

5. In completing applications for insurance policies, Thompson Associates, Inc. dealt exclusively with a New Jersey-based entity known as American Benefits Society.

6. I do not maintain an address, post office box, or telephone number in Nevada. I have no employees in Nevada, and do not own property in Nevada. I do not conduct any ongoing or regular business with persons or entities residing in Nevada.

7. Thompson Associates, Inc. does not maintain an address, post office box, or telephone number in Nevada. Thompson Associates, Inc. had no employees in Nevada, and does not own property in Nevada. Thompson Associates, Inc. does not conduct any ongoing or regular business with persons or entities residing in Nevada.

8. I am a resident of Kentucky, and primarily conduct business in Kentucky. Thompson Associates, Inc. is a Kentucky business, with a client base made up primarily of Kentucky residents.

FURTHER AFFIANT SAYETH NAUGHT.


DON THOMPSON

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December, 2003.

My Commission expires:

Notary Public